Supreme Court, U.S.
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No. 95-1924

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JERRAL W. JONES AND MICHAEL V. MCCOY,

Petitioners,

v.

BOB KLEIN AND GENEVIEVE KLEIN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

The royalty-holder respondents and the Arkoma respondents both *agree* that petitioners were entitled to a trial of the core factual issue in this case: whether petitioners in fact settled the take-or-pay claim and received the proceeds of that settlement, or instead sold Arkoma subject to that claim, so that any obligation to the royalty holders remained Arkoma's responsibility. *See* Royalty Holders' Opp. 3; Arkoma's Opp. 3. The respondent groups offer quite different responses to the court of appeals' finesse.

The royalty holders argue that petitioners *had* such a trial: "Petitioners participated in a five day trial on the merits after the remand ordered in *Klein I*." Royalty Holders' Opp. 3; *see id.* at 6. But this argument just turns the knife in the wound: at that trial, the district court found in favor of petitioners on the point at issue; the court of appeals rejected this well supported finding, *not* on the evidence but, rather, on the ground that no trial should have been held at all, because the issue was resolved by the "mandate" from the earlier appeal. *See* Pet. 7. The royalty holders offer no defense of the court of appeals' transmutation of its own recitals of the royalty holders' allegations into an appellate "mandate."[1/]

1/ The royalty holders do assert at one point (Royalty Holders' Opp. 5) that the court of appeals concluded that the district court's finding was "clearly erroneous," but the court of appeals never used

(continued...)

The royalty holders also point to a court of appeals' footnote stating that its view of the facts, without benefit of trial, "reflect[s] economic reality" (Royalty Holders' Opp. 4 citing Pet. App. 8a), apparently because petitioners received cash for Arkoma. But if petitioners had sold an apartment building for cash subject to the rights of the tenants, they would not automatically be liable if their vendee subsequently kicked the tenants out. Petitioners have contended from the beginning that (substituting royalty holders for tenants) that is exactly what happened here -- and the trier of fact so found. Jettisoning that finding on the ground that it was not a triable issue at all was a multimillion dollar error by the court of appeals.

The Arkoma respondents (who, petitioners contend, must bear any liability to the royalty holders) agree with petitioners that the court of appeals' handling of the core factual issue was "astonishing." Arkoma's Opp. 3. Indeed, they concede (contrary to their own interest) that the court of appeals action was "clearly wrong and [was] derived by a procedure so far departing from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power." *Id.* 4.

Petitioners agree, and would add only that they have been deprived of the core of due process.

[1/](...continued)
those words nor said any such thing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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